Supreme Court
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No. 94-822

In The

Supreme Court of the United States

October Term, 1994

DORIS HELLER,

Petitioner,

vs.

NORCAL MUTUAL INSURANCE CO., et al.,

Respondents.

Petition For Writ Of Certiorari To California Supreme Court

BRIEF IN OPPOSITION BY RESPONDENT NORCAL MUTUAL INSURANCE CO.

JOSEPH H. FAGUNDES
Counsel of Record
DIEHL, STEINHEIMER, RIGGIO, HAYDEL & MORDAUNT
A Professional Law Corporation
400 E. Main Street, Suite 600
P. O. Box 201072
Stockton, CA 95290
Telephone: (209) 464-8732

Attorneys for Respondent Norcal Mutual Insurance Co.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Petitioner's physician communicated with his insurer during litigation petitioner was pursuing against a second physician and petitioner then sued alleging violations of the California state law but did not raise any issues under federal law. This court has consistently refused to hear federal issues that have not been raised in the state courts. Should this court grant the petition based on federal law which was not raised in the state court proceedings?

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STATEMENT OF THE CASE

This matter has a long procedural history because petitioner had difficulties attempting to state a cause of action. She was allowed a Fourth Amended Complaint, her fifth pleading attempt, before the court finally dismissed the matter against Norcal Mutual Insurance Company (hereinafter referred to as Norcal),[1] Kent Yamaguchi, M.D. (hereinafter referred to as Dr. Yamaguchi), and other parties who are no longer part of the proceeding.

A. Petitioner's Allegations In The Trial Court.

Petitioner's theory was that Norcal and Dr. Yamaguchi somehow conspired to share confidential information about her during her malpractice action against another physician, John Geis, M.D. That initial malpractice action eventually settled for $400,000.00 for the loss of the fourth digit of the left hand. Significantly, petitioner's trial court pleadings and appellate court briefs all failed to set forth any supposed confidential facts that Dr. Yamaguchi disclosed.

It can be assumed after petitioner's filing of numerous pleadings that she cannot state any specific facts which were disclosed. In fact, petitioner's deposition of Dr. Yamaguchi was submitted to the California

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[1] Norcal has no parent companies or non-wholly owned subsidiaries pursuant to United States Supreme Court Rules, Rule 29.1.

Supreme Court in its entirety and no confidential information disclosure was shown other than that authorized in the petitioner's malpractice action against Dr. Geis.

B. Decision of the California Fifth District Court of Appeal.

The Fifth District Court of Appeal in California reversed only those causes of action based on the California constitutional right to privacy and the alleged statutory violation of Civil Code sections 56.10, *et seq.* The court found that the information allegedly gathered probably was discoverable, and even admissible, but that the method of disclosure was improper.

C. Decision of the California Supreme Court.

The California Supreme Court reversed the appellate court ruling that the entire matter be dismissed as against these respondents.[2] The Supreme Court interpreted Civil Code sections 56.10, *et seq.* and the California right to privacy consistent with the arguments made by the respondents throughout the proceedings. There were no new issues or surprises by the California Supreme Court and petitioner had ample opportunity throughout the proceedings to assert any federal constitutional grounds that she may have felt applicable and simply did not do so.

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[2] A cause of action for alleged medical negligence against Dr. Yamaguchi was still pending in Superior Court as it had not been dismissed.

SUMMARY OF FACTS AND ARGUMENT

The Petition for Writ of Certiorari should be summarily denied as petitioner never raised any federal issues during the entire proceedings in California. None of her pleadings, and more particularly none of the briefs before the appellate court and Supreme Court, referred to the federal constitutional right of privacy, the Fourteenth Amendment to the United States Constitution, the International Covenant on Civil and Political Rights, or any other alleged federal right.

Throughout her case, petitioner focused on the interpretation of California Civil Code sections 56.10, *et seq.* and the California right of privacy as encompassed in Article I, section 1, of the California Constitution. At no time did petitioner ever assert that sections 56.10, *et seq.* were unconstitutional nor did she ever argue any state action or applicability of the Fourteenth Amendment. Petitioner has failed to state any valid reason for this court to exercise jurisdiction.

ARGUMENT

I. THIS PETITION SHOULD BE DENIED BECAUSE NO FEDERAL ISSUE WAS RAISED IN THE CALIFORNIA COURTS.

A. Review Should Not Be Granted Because No Issues Of Federal Law Were Pressed Or Passed Upon By The California Supreme Court.

"[I]t is only final judgments with respect to issues of federal law that provide a basis for [United States

Supreme Court] appellate jurisdiction with respect to state court cases." (*New York Times Company v. Jascalevich*, 439 U.S. 1317, 1318, 99 S.Ct. 6 (1978).) Where an issue of federal law has not been both asserted and adjudicated in the State Court, this court will not exercise appellate jurisdiction. (*McGoldrick v. Campagnie Generale Transatlantique*, 309 U.S. 430, 434-435, 60 S.Ct. 670 (1940); see also *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161 (1969).) This is not the type of "exceptional case" which would justify such jurisdiction:

> [I]t is . . . the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. . . . Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there.

(*McGoldrick* at 434.) The *McGoldrick* decision is consistent with a long line of cases from this court. Petitioner's citation of this court's decision over 90 years ago in *Dewey v. Des Moines*, 173 U.S. 193, 19 S.Ct. 379 (1899), is misleading since that case stands for the proposition that the record in the state court must support her claim that an asserted federal right was denied.

> A claim or right which has never been made or asserted cannot be said to have been denied

> by a judgment which does not refer to it. . . . A point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of.

(*Id.* at 200.)

The federal constitutional claim in *Dewey* was not raised in the state court and the record did not clearly implicate "a provision of the constitution or act of congress." (*Dewey*, 173 U.S. at 198-199.)

Petitioner never raised any federal issues in the California courts. Her Fourth Amended Complaint alleged in the twelfth cause of action that the acts of respondents "betrayed [petitioner's] constitutional right of privacy," but did not specify any assertion of a federal constitutional right. (Respondent's Appendix, pp. 1-3.) Thereafter, every brief petitioner filed asserted only the right of privacy contained in the California constitution.[3] Contrary to petitioner's assertions, no reference was made to privacy rights under any federal authorities in her

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[3] Respondent's appendix: Heller's Opening Brief in the Fifth District Court of Appeals, pp. 4-11; Heller's Reply Brief in the Fifth District Court of Appeals, pp. 12-15; Heller's Answer to Petition for Review in the California Supreme Court, pp. 16-21. Petitioner's Appendix: Heller's Answer Brief on the Merits in the California Supreme Court, pp. 90a-100a.

answer brief on the merits in the California Supreme Court.[4]

B. The Decision Of The California Supreme Court Was Based On California Law.

The ruling of the California Supreme Court was based only on the California constitution, and California statutes. The court specifically identified the issues as whether ex parte discussions "between a nonparty treating physician and the defendant physician's malpractice insurer" violated either Civil Code sections 56.10, *et seq.* or "plaintiff's constitutional right to privacy under article I, section 1 of the California constitution." (*Heller v. Norcal Mutual Insurance Company*, 8 Cal.4th 30, 34-35 (1994).)[5]

The court determined that no constitutional right was violated stating because "plaintiff has failed to establish the second essential element of a *state* constitutional cause of action for invasion of privacy." (*Id.* at 43, emphasis added.) The court did not mention the federal

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[4] Petitioner also apparently contends that the mere reference to federal cases in *Hill v. NCAA*, 7 Cal.4th 1 (1994) is enough to raise a federal question in the case. However, she cites no authority to support this contention. Such an exclusion is contrary to the cases cited above which require that the federal question appear *in the record* of the case *before the court*. (See, *e.g.*, *Dewey*, 173 U.S. at 200.)

[5] Even when a federal question has been asserted in the state court, if the case is decided on independent and adequate state grounds, this court will not review the state court's ruling. (*Hammerstein v. Superior Court of California*, 340 U.S. 622, 623, 71 S.Ct. 521 (1951); *Edelman v. People of State of California*, 344 U.S. 357, 361-362, 73 S.Ct. 293 (1953).)

constitution or any international treaties as those were not issues raised by petitioner. After the opinion issued the petitioner did not request a rehearing and made no attempt to raise any federal constitutional or treaty issues.[6] Furthermore, there is no state action involved which would make the Fourteenth Amendment apply.

II. PETITIONER HAS NOT ESTABLISHED A CLAIM UNDER THE FOURTEENTH AMENDMENT.

A. There Was No State Action By Respondents.

This court has often held that to establish a Fourteenth Amendment claim against a private defendant, the plaintiff must establish "state action" by that defendant. (See *e.g., National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454 (1988); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-838, 102 S.Ct. 2764 (1982).) Moreover, the mere regulation of a private business by the state is not sufficient to render the conduct of the business "state action" as explained by this court:

> The mere fact that a business is subject to state regulation does not by itself convert its action to that of the state for purposes of the Fourteenth Amendment. . . . It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus

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[6] California Rules of Court, Rule 27, allows a party to request a rehearing after the decision has been rendered.

> between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

(*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-351, 95 S.Ct. 449 (1974); see also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965 (1972).)

In *Jackson v. Edison*, petitioner brought an action against a privately owned and operated utility after her electrical service was terminated. (419 U.S. at 347-348.) This court rejected contentions that the utility's conduct constituted state action either because the state extensively regulated it or because a monopoly status had been conferred.[7] Neither of these factors were sufficient to render the utility's conduct "state action" for purposes of the Fourteenth Amendment.[8]

> All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory,

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[7] Petitioner also cites *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S.Ct. 226 (1944), as suggesting that the existence of a monopoly is relevant in determining whether state action exists. However, a review of *Steele* does not disclose any such statement by the court. Moreover, any such conclusions would be contrary to the court's subsequent holding in *Jackson v. Edison*.

[8] The court also rejected contentions that the respondent's conduct was state action because it provided an essential service, and that the state had approved the termination procedure. (*Jackson*, 419 U.S. at 353-355.)

> and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision, this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment.

(419 U.S. at 358; see also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965 (1972).)

Similarly, regardless of Norcal Insurance Company's membership in the Joint Underwriting Association, or California's regulation of the insurance industry in that state, Norcal is a private corporation. There is no state involvement other than insurance industry regulation. Nearly every industry is subject to state regulation of some sort and such regulation does not constitute "state action." (*Jackson*, 419 U.S. at 354.)[9] Also, there is no evidence that Norcal enjoyed a monopoly in California. Under established case law, its acts cannot be considered state action.[10]

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[9] As stated by Justice Rehnquist in *Jackson*:

> Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State.

(*Jackson*, 419 U.S. at 354.)

[10] Petitioner's cases asserting state action because of state judicial decisions are inapposite as dealing with racially restrictive covenants (*Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1947))

B. There Was No Violation Of Fourteenth Amendment Rights.

1. A balancing of privacy rights against disclosure was appropriate.

State action is lacking and petitioner cites no authority for her assertion that a compelling state interest must be shown to justify a violation of privacy interest under the federal constitution. Indeed, the federal cases have not set forth such a standard.

This court has considered the constitutionality of a statute requiring physicians to report the names and addresses of patients prescribed certain drugs. (*Whalen v. Roe*, 429 U.S. 589, 591-593, 97 S.Ct. 869 (1977).) The statute was challenged as allegedly violating two types of privacy interests – avoiding disclosure of personal matters, and making certain kinds of important decisions without governmental interference. (*Id.* at 599-600.) However, the court found that the statute did not pose a significantly grievous threat to either interest. (*Id.* at 600.) Therefore, the court reversed a lower court's decision enjoining the statute's enforcement. (*Id.* at 606.)

In testing the state's constitutionality, the court did not require a compelling state interest. Rather, the court was satisfied that the statute was "[t]he product of an orderly and rational legislative decision" based on the

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and labor dispute picketing. (*American Federation of Labor v. Swing*, 312 U.S. 321, 61 S.Ct. 568 (1941).)

state's "reasonable exercise of New York's broad police powers." (*Id.* at 597-598.)[11]

In fact, the cases which have required the showing of a compelling government interest are those which have involved a fundamental right. Petitioner did not allege or establish the violation of a fundamental right in this case. The only privacy interest allegedly invaded is her relationship with a physician who treated her for the same malady for which she was suing another physician. She did not allege any interference with marriage, procreation, family relationships, child rearing or education. (*Whalen*, 429 U.S. at 600, fn. 26 and 604, fn. 33; see also *Carey v. Population Services International*, 431 U.S. 678, 688-689, 97 S.Ct. 2010 (1977); *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965).)

Petitioner cited no cases supporting her contention that the right to choose a physician is protected by a compelling state interest test under the Fourteenth Amendment. Moreover, none of the appellants in these cases asserted the right to choose a physician as the right allegedly violated. Finally, petitioner's right to choose a physician was not an issue.

She cites a case involving a statute making it unlawful for the physicians to discuss contraception with married persons. (*Griswold*, 381 U.S. 479, 480.) Because of the

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[11] Consistent with this court's decision in *Whalen*, was the decision in *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777 (1977), where the court balanced the intrusion of the government's conduct against the appellant's asserted privacy rights. (*Id.* at 465.)

adverse impact on the marital relationship, the statute was considered unconstitutional. (*Id.* at 486.)

She then cites *Doe v. Bolton*, 410 U.S 179, 93 S.Ct. 739 (1973), which involved a statute making abortions illegal except in certain situations and then only when various procedural criteria were met. (*Id.* at 181-184.) The court held that certain procedural requirements in the statute violated the appellant's constitutional rights and struck those provisions from the statute. (*Id.* at 201-202.) The court never discussed the right to choose a physician. The *Doe* decision was based solely upon the patient's right to choose an abortion, and the physician's right to practice his profession without unwarranted interference. Neither of these issues have been raised in this case.

Finally, petitioner relies upon *Mills v. Rogers*, 457 U.S. 291, 102 S.Ct. 2442 (1982), which deals with a Fourteenth Amendment interest in refusing unwarranted treatment. However, petitioner has not asserted a right to refuse treatment in this case. Moreover, it is difficult to imagine how a physician's contacts with his own insurance company could deny petitioner the right to refuse treatment by the physician.

Because petitioner did not plead or establish a fundamental right violation, there is no authority to weigh any alleged privacy violation under the federal constitution. Thus, it cannot be asserted that the California Supreme Court acted inappropriately by balancing the interests under the California Constitution.

2. The California Supreme Court did not apply the law inconsistently.

Petitioner has cited *Hill v. NCAA*, 7 Cal.4th 1 (1994), out of context. Contrary to her assertion, the California right to privacy can be adjudicated as a matter of law as Chief Justice Lucas explained:

> Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. . . . Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law in fact. *If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law.*

(*Hill*, 7 Cal.4th at 40, emphasis added.)

In *Heller,* the court reviewed a ruling sustaining a demurrer without leave to amend. Pursuant to state law, the consideration of the demurrer required that the court accept the allegations as being true, which the court did. (*Heller*, 8 Cal.4th at 36.) Therefore, the facts before the court were undisputed for purposes of its review.

Based upon those undisputed facts, the court determined that petitioner had not pled either a legally protected privacy interest, or a reasonable expectation of privacy in information that would have eventually been discovered in litigation. (*Id.* at 45.) The court additionally concluded that she had not alleged a sufficiently serious invasion of her privacy interests to warrant actionable

relief under the privacy clause of the state constitution. (*Id.* at 45-46.)

Since the court determined that the undisputed material facts before it showed no reasonable expectation of privacy or an insubstantial impact on privacy interests, the court correctly applied the law as stated in *Hill v. NCAA*.

III. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) WAS NEITHER RAISED NOR IS IT APPLICABLE.

A. Petitioner Made No Reference To The ICCPR In The California Courts.

The presumption against addressing questions not pressed or passed upon the California courts applies to the interpretation of an international treaty.

Petitioner's failure to raise any issues involving the applicability and interpretation of the ICCPR in the California courts weighs so heavily that this court should not take up these issues which were never briefed or considered previously. This would be in keeping with this court's policies regarding the following needs: respecting comity of the state court; requiring a properly developed record on appeal; and scrupulously adhering to the customary limitations on discretion where difficult issues are involved. (*Banker's Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 79, 108 S.Ct. 1645 (1988).)

No mention of the ICCPR was made until filing of the petition with this court. Petitioner failed to do so even though the United States signed the Covenant on or

about March 23, 1966, (*People v. Ghent*, 43 Cal.3d 739, 781 (1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1099 (1988)) over 23 years before petitioner filed her suit against the respondents on August 22, 1989. The Covenant was ratified by the United States Senate on or about September 8, 1992 (Dept. of State Public Notice 1853, 58 Fed.Reg. 104(a) (1993)), after petitioner had filed her reply brief in the intermediate court of appeal but over eight months before oral argument in that court. She failed to raise it even though the appellate court has provisions for citation of new authorities prior to oral argument.[12] The Covenant was then published in the *Federal Register* on August 31, 1993, two weeks before the petitioner filed her opposition to Norcal's Petition for Review before the California Supreme Court and over five months before she filed her brief on the merits.

Petitioner had ample time in which to raise issues involving an international treaty before the California Supreme Court and failed to do so.

B. The ICCPR Does Not Apply As It Was Non-Self-Executing.

Petitioner's argument that the ICCPR provides expanded rights of privacy is fatally flawed because Article 17 upon which she relies is not self-executing. Treaties have immediate domestic effect as the supreme law of the

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[12] The Fifth District Court of Appeals sent out a notice requesting citation of any new authorities which the parties wished to bring to the court's attention. (Respondent's Appendix, pp. 23-24.)

land under Article VI, Clause 2 of the United States Constitution only when they are self-executing. In this case, the United States Senate presented its advice and consent to the ICCPR subject to the following declaration:

> That the United States declared that the provisions of Articles 1 through 27 of the Covenant (ICCPR) are not self-executing.

(Department of State Public Note 1853, 58 Fed.Reg. 104a (1993).) Based on that Senate declaration the courts in the United States cannot give the treaty effect as domestic law in the absence of necessary implementation. (Restatement (3rd) of Foreign Relations Law of the United States (1986) §§ 111(3) and (4).) In interpreting such a treaty the federal courts have to examine the ratification history including senate reservations, understandings, and declarations made in conjunction with the advise and consent power. (*United States v. Stewart*, 489 U.S. 353, 366, 109 S.Ct. 1183 (1988).)[13]

Petitioner argued that the declaration of non-self-execution by the Senate is void and she relies on a decision from the District of Columbia Circuit Court in *Power Authority v. Federal Power Commission*, 247 F.2d 538 (D.C. Cir. 1957) which in fact was vacated by this court in *Power Authority of New York v. Federal Power Commission*, 355 U.S.

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[13] Petitioner misapplies the decisions in *U.S. v. Percheman*, 32 U.S. (7 Pet.) 51, 82 (1833), *Burgess v. Gray*, 57 U.S. (16 How.) 48, 50 (1853), and *People of Saipan v. United States Department of Interior*, 502 F.2d 90 (1974), as those cases involved interpretation of treaties where the United States Senate and the treaties made no specific comment on the issue of self-execution.

64, 78 S.Ct. 141 (1957). The decision to vacate the judgment of the lower court "deprives that court's opinion of precedential effect. . . . " (*O'Connor v. Donaldson*, 422 U.S. 563, 577, fn. 12, 955 S.Ct. 2486 (1975).)

CONCLUSION AND SUMMARY

Petitioner made no attempt to raise any issues involving the federal constitution or international treaties in her voluminous pleadings and arguments before the courts in the State of California. She now wishes to invoke this court's jurisdiction at the eleventh hour by purportedly raising federal issues only because she failed in her efforts to convince the California Supreme Court to interpret California Civil Code sections 56.10, *et seq.* and the California constitutional right to privacy in a manner supportive of her claims. She failed and should not be allowed to change her arguments by attempting to invoke this court's jurisdiction. This is especially true where state action is lacking and petitioner's theories of federal law violations are not applicable.

DATED: November 25, 1994

Respectfully submitted,

DIEHL, STEINHEIMER, RIGGIO,
HAYDEL & MORDAUNT
JOSEPH H. FAGUNDES
Attorneys for Respondent
Norcal Mutual Insurance Co.

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ROGER K. VEHRS #073018
Attorney at Law
2300 Tulare Street
250 Civic Center Square
Fresno, California 93721
Telephone: (209) 442-4211

Attorney for Plaintiff
DORIS HELLER

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

* * *

DORIS HELLER,

Plaintiff,

vs.

NORCAL MUTUAL INSURANCE CO.; KENT YAMAGUCHI, M.D.; VALLEY PLASTIC SURGEONS MEDICAL GROUP, INC., sued herein as DOE 2; CENTRAL CALIFORNIA FACULTY MEDICAL GROUP, INC.; HERBERT W. BORRO, M.D., sued herein as DOE 1; DOES 2 through 10, Inclusive; DOES 11 through 20, Inclusive; and DOES 21 through 30, Inclusive,

Defendants.

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SUMMONS ISSUED
CASE NO. 405369-0

FOURTH AMENDED COMPLAINT FOR DAMAGES

(1) MEDICAL NEGLIGENCE;
(2) NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS;
(3) NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS;
(4) NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS;

(5) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS;
(6) INTENTIONAL INTERFERENCE WITH PHYSICIAN/ PATIENT CONTRACTUAL RELATIONSHIP;
(7) WRONGFUL DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION [CC 56];
(8) WRONGFUL DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION [CC 56];
(9) WRONGFUL DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION [CC 56];
(10) UNFAIR BUSINESS PRACTICES;
(11) CONCEALMENT
(12) VIOLATION OF CONSTITUTIONAL RIGHT OF PRIVACY

(Filed Nov. 21, 1990)

* * *

12

TWELFTH CAUSE OF ACTION

(Violation of Constitutional Right of Privacy by DR. YAMAGUCHI and NORCAL MUTUAL INSURANCE COMPANY)

75. Plaintiff incorporates herein the allegations set forth in Paragraphs 1 through 23, inclusive, as if set forth here in full.

76. That at all times mentioned herein, Plaintiff was a patient of DR. YAMAGUCHI and during the course of his treatment of the plaintiff, he acquired confidential and private information.

77. That on or about June 15, 1988, October 18, 1988, December 15, 1988, December 22, 1988, and January 12, 1989, DR. YAMAGUCHI betrayed Plaintiff's constitutional right of privacy by secretly disclosing confidential and private information and other unknown information to NORCAL MUTUAL INSURANCE COMPANY'S and its agents and employees.

78. That the acts of NORCAL MUTUAL INSURANCE COMPANY and DR. YAMAGUCHI were done in violation of the discovery statutes and laws then in effect throughout the State of California.

79. As a direct and proximate result of the violation of Plaintiff's constitutional right to privacy by disclosing the above information, Plaintiff has sustained mental, emotional and financial damages in a sum to proved at trial.

* * *

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

DORIS HELLER, Plaintiff and Appellant, vs. NORCAL MUTUAL INSURANCE COMPANY, et al. Defendants and Respondents.	5 Civil No. F015875 Fresno County Superior Court No. 405369-0
DORIS HELLER, Petitioner, vs. SUPERIOR COURT, FRESNO COUNTY Respondent, NORCAL MUTUAL INSURANCE CO., et al., Real Parties in Interest.	

APPELLANT'S OPENING BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

Honorable Gary R. Kerkorian

Roger K. Vehrs (#073018)
Attorney at Law
2300 Tulare Street, Ste. 250
Fresno, California 93721
Telephone (209) 442-4211

James F. Tritt (#056171)
TRITT & TRITT
Attorneys at Law
470 E. Herndon, Ste. 201
Fresno, California 93720
Telephone (209) 435-3025

Attorneys for Appellant
DORIS HELLER

* * *

V

EVEN IF CIVIL CODE SECTION 47(b) WERE APPLICABLE, IT WOULD BE OVERRIDDEN BY RESPONDENTS' VIOLATIONS OF APPELLANT'S CONSTITUTIONAL RIGHT OF PRIVACY.

In *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, a psychotherapist disclosed confidential matters concerning his patient in a lawsuit. The patient sued the psychotherapist for violating the patient's right to privacy. The trial court sustained the psychotherapist's demurrer without leave to amend, finding the disclosures privileged under the predecessor to Civil Code section 47(b).

The appellate court based its analysis on the *"the close analogy between a physician-patient and a psychotherapist-patient relationship.* (*Id.* at p. 483.) Relying on prior decisions which held that California's constitutional right of privacy protects medical information, the *Cutter* court concluded that details of the psychotherapists's [sic] professional relationship with his patient also fell within the zone of privacy protected by the state constitution. (*Id.* at pp. 842-843.) The court then noted that the predecessor of Civil Code section 47(b) would permit an infringement of

the right of privacy by denying a remedy in damages when an invasion of privacy occurred in a judicial proceeding. (*Id.* at p. 844.) Therefore, constitutional scrutiny was appropriate. (*Ibid.*) The court concluded that the constitutional right to privacy outweighed the policies underlying Civil Code section 47(b), and held that the psychotherapist's conduct was not protected by Civil Code section 47(b). (*Id.* at pp. 846-848.)

The instant case is indistinguishable from *Cutter* as applied to disclosures by YAMAGUCHI of constitutionally-protected private information of appellant. The *Cutter* analysis was based upon the analogy between a psychotherapist and a physician. YAMAGUCHI, as a physician, therefore falls within the *Cutter* reasoning and holding. Thus, Civil Code section 47(b) does not immunize YAMAGUCHI from wrongfully disclosing confidential material.

It has long been recognized that a person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature, than many other judicially protected areas, and as such, falls squarely within the protected ambit of the right of privacy delineated by the California Constitution. (See *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 678-679.) *Cutter* has been recognized in subsequent decisions as holding that the constitutional right to privacy outweighs the policies underlying the "judicial proceedings immunity" of Civil Code section 47(b). (See *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1042, ftnt. 3.)

More recently, it has squarely been held that the disclosure by a medical doctor of medical information concerning a patient is *not* privileged under Civil Code section 47(b). The constitutional right of privacy prevails over the privilege as to medical doctors. In *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, a doctor obtained information while examining the plaintiff in connection with a workers' compensation action. Although there was no confidential physician/patient relationship as to the medical examination arranged for the benefit of the workers' compensation carrier, in the course of that examination, the plaintiff revealed his HIV positive status at a time and for a purpose that had no connection with the workers' compensation case. (*Id.* at p. 1135.) Thus, the plaintiff was not deemed to have waived his physician/patient privilege as to his HIV positive status, which he had elected to disclose to alert the nurse to take special precautions in handling his blood. (*Ibid.*) Relying on *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, the court held that the constitutional right to privacy covered medical information and outweighed the policies underlying the judicial proceedings immunity of Civil Code section 47(b). (See *Urbaniak v. Newton, supra,* 226 Cal.App.3d 1128, 1141.)

Since *Urbaniak* applied the *Cutter* holding to a doctor who was not a psychotherapist, there is no basis for any contention in this case that the *Cutter* holding is to be limited to psychotherapists. *Urbaniak* makes it clear that the *Cutter* holding also applies to ordinary physicians. Therefore, Civil Code section 47(b) does not immunize a physician from disclosing confidential medical information in violation of the California constitutional right to

privacy. (*Urbaniak v. Newton*, (1991) 226 Cal.App.3d 1128, 1141; *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 847-848.)

Another recent case, *ITT Telecom Products Corp. v. Dooley* (1989) 214 Cal.App.3d 307, 317-320, has held that Civil Code section 47(b) will not immunize a person who discloses information in violation of a contract of confidentiality. The court refused to grant immunity under Civil Code section 47(b) to the disclosure of trade secrets in violation of a contract of confidentiality. That reasoning also supports the inapplicability of Civil Code section 47(b) in the instant case. When appellant consulted YAMAGUCHI as a physician, the doctor by virtue of his fiduciary status entered into a contract of confidentiality of no lesser sanctity than that protected by the court in *ITT Telecom Products Corp. v. Dooley, supra.* Disclosures by YAMAGUCHI in violation of his fiduciary relationship with his patient are not immunized under Civil Code section 47(b), for the same reasons that other disclosures in violation of other contracts of confidentiality are not immunized. See *ITT Telecom Products Corp. v. Dooley, supra,* 214 Cal.App.3d 307, 317-320.)

VI

THE SUBJECT ORDERS SHOULD NOT BE UPHELD ON THE GROUND THAT APPELLANT WAIVED ALL OF HER PRIVACY EXPECTATIONS CONCERNING CONFIDENTIAL INFORMATION SHE ENTRUSTED TO YAMAGUCHI AND BORO.

Contrary to suggestions at the trial court level, the mere fact that appellant filed a medical injury action

against Dr. Geis does not mean that appellant waived *all* of her privacy expectations concerning confidential information in the possession of YAMAGUCHI and BORO. As stated in *Slagle v. Superior Court* (1989) 211 Cal.App.3d 1309, 1313 a patient tenders the issue of his physical health if he files an action for personal injuries "but only as to information that relates to the claimed injuries." In the instant case, the allegations of confidential information are not limited to the specific injuries at issue in the Geis lawsuit. In fact, it is specifically alleged that respondents obtained and used information *unrelated* to any issues in the Geis litigation.(CT 817-818, 1469-1470.)

In *Britt v. Superior Court* (1978) 20 Cal.3d 844, 862-865, and in *In Re Lifschutz* (1970) 2 Cal.3d 415, 430-436, our Supreme Court held that careful balancing and evaluation is required to determine the scope of a waiver of the physician/patient privilege resulting from litigation. In both of those cases, the Supreme Court made it clear that a blanket waiver of all confidentiality does not result from the filing of a lawsuit tendering a medical condition. Thus, even if Civil Code section 47(b) were applicable, that section would have to give way to the constitutional right of privacy, and respondents' demurrers should have been overruled.

This conclusion is bolstered by the distinction noted by the court in *Heda v. Superior Court* (1990) 225 Cal.App.3d 525, 530, when the court recognized that privacy rights may be waived, but stressed that "waivers of constitutional rights are not lightly found." In *Jones v. Superior Court* (1981) 119 Cal.App.3d 534, 547, the court noted that the scope of the waiver should be determined by reference to the purpose of the privilege, which is to

preclude the humiliation of the patient that might follow disclosure of his ailments. Thus:

> "It may be appropriate to say, for example, that petitioner is no longer in a position to invoke the privilege with respect to communications concerning prescription of DES for subsequent pregnancies; but it does not follow that she retains no interest in the confidentiality of other portions of her medical history, even assuming that history is relevant, as defendants contend, to the resolution of the factual issues posed in the litigation." (*Id.* at p. 548.)

For these reasons, it does not follow that merely because appellant sued Dr. Geis, she automatically waived all of her privacy rights in connection with her medical history. Moreover, the Fourth Amended Complaint and the Proposed Fifth Amended Complaint allege very clearly that appellant entrusted private and intimate information to YAMAGUCHI and BORO which was outside the scope of her lawsuit against Dr. Geis. (CT 817-818, 1469-1470.) The contention that the Geis lawsuit automatically effected a waiver, such that YAMAGUCHI was free to disclose appellant's entire medical and related history to the world at large, is not supported by the contents of the complaints and does not furnish a basis for sustaining the demurrers.

Since a blanket waiver cannot be found as a matter of law, it cannot be determined at the demurrer stage that the immunity of Civil Code section 47(b) must apply. In other words, because there are potential issues for a finder of fact concerning whether appellant waived her privacy rights, there are also potential issues concerning

whether those privacy rights will prevail over the immunity of Civil Code section 47(b). If appellant has not waived her privacy rights, the case law is clear that those privacy rights will prevail over Civil Code section 47(b) and that none of the respondents will be entitled to claim immunity based upon Civil Code section 47(b). (See *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 847-848; *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1141.)

* * *

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

DORIS HELLER, Plaintiff and Appellant, vs. NORCAL MUTUAL INSURANCE COMPANY, et al. Defendants and Respondents.	5 Civil No. F015875 Fresno County Superior Court No. 405369-0
DORIS HELLER, Petitioner, vs. SUPERIOR COURT, FRESNO COUNTY Respondent, NORCAL MUTUAL INSURANCE CO., et al., Real Parties in Interest.	

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

Honorable Gary R. Kerkorian

Roger K. Vehrs (#073018)
Attorney at Law
2300 Tulare Street, Ste. 250
Fresno, California 93721
Telephone (209) 442-4211

James F. Tritt (#056171)
TRITT & TRITT
Attorneys at Law
1540 E. Shaw Avenue, #115
Fresno, California 93710
Telephone (209) 224-7882

Attorneys for Appellant
DORIS HELLER

* * *

IV.

APPELLANT'S CONSTITUTIONAL RIGHT OF PRIVACY OVERRIDES CIVIL CODE SECTION 47(b)

Respondents have suggested that some form of a balancing test be used in determining whether wrongful communicative conduct, in violation of the physician-patient privilege and therefore in violation of the Constitutional right of privacy, shall be given immunity under Civil Code section 47(b). While right of privacy objections must be determined in discovery based upon the balancing test, such test is not appropriate in assessing whether a cause of action is to be given immunity under Civil Code section 47(b). It has already been clearly and directly held, in *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 847-848, that the Constitutional right of privacy automatically outweighs the privilege of Civil Code section 47(b). As the *Cutter* court stated, at 183 Cal.App.3d 848:

> We have determined that the Constitutional right to privacy outweighs the policies underlying the judicial proceedings immunity when private material is voluntarily published, without resort to a prior judicial determination.

This holding has been reaffirmed in *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1141, in which the *Cutter* holding was applied to a medical doctor. Thus, the liability of Yamaguchi and Boro for their communicative acts in violation of the physician/patient privilege is not given immunity under Civil Code section 47(b).

V.

APPELLANT'S FILING OF HER LAWSUIT AGAINST DR. GEIS DID NOT EFFECT A BLANKET WAIVER OF ALL CONFIDENTIAL COMMUNICATIONS WITH HER PHYSICIANS

Respondents have sought to avoid the implications of *Cutter v. Brownbridge* and of *Torres v. Superior Court* by arguing that because she sued Dr. Geis for personal injuries, appellant effected a blanket waiver of all her confidential communications to all her treating physicians. Case law does not support that position. Instead, the cases indicate that there is no such blanket waiver, and that a patient/litigant only consents to a limited waiver of medical information which relates to the injuries for which recovery is sought. (See *Britt v. Superior Court* (1978) 20 Cal.3d 844, 862.) Thus, in *Britt*, a trial court discovery order was reversed where the order would have permitted inquiry into plaintiffs' private associational affiliations and activities and lifetime medical histories. The Supreme Court permitted inquiry only into medical information relevant to the claimed injuries. In the instant case, appellant alleges the wholesale disclosure of all private, intimate, financial, medical and other information, going far beyond legitimate discovery,

by the physician/respondents. Under *Britt*, appellant did not waive her right to privacy as to those materials.

Numerous cases recognize the limited character of the waiver by a patient/litigant. See, for example, *In re Lifschutz* (1970) 2 Cal.3d 415, 427, 431, 434-435; *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 340-343 (waiver form signed by patient litigant authorizing release of "medical history, physical condition and treatment rendered" construed as limited only to reports and records regarding injuries resulting from the particular accident at issue); *Hallendorf v. Superior Court* (1978) 85 Cal.App.3d 553, 555-557 (plaintiff suing for personal injuries including unspecified general damages not required to disclose entire medical history); *Jones v. Superior Court* (1981) 119 Cal.App.3d 534, 547 (recognizing scope of waiver limited to particular injury tendered by party); *Heda v. Superior Court* (1990) 225 Cal.App.3d 525, 529-530 (holding defendant did not waive privacy rights by using health to change deposition and by testifying to heart problems, the court stating that waivers of Constitutional rights are not lightly found); *Slagle v. Superior Court* (1989) 211 Cal.App.3d 1309, 1313 (recognizing waiver only as to information which relates to the claimed injuries).

* * *

IN THE SUPREME COURT OF CALIFORNIA

DORIS HELLER, Plaintiff and Appellant, vs. NORCAL MUTUAL INSURANCE COMPANY, et al. Defendants and Respondents.	Case No. S-034539 (FIFTH DISTRICT COURT OF APPEAL NOS. 5 CIVIL F015875 AND F016047)
DORIS HELLER, Petitioner, v. FRESNO COUNTY SUPERIOR COURT, Respondent.	(Fresno County Superior Court No. 405369-0)
NORCAL MUTUAL INSURANCE COMPANY, et al. Real Parties in Interest.	

ANSWER TO PETITION FOR REVIEW

AFTER A DECISION BY THE FIFTH DISTRICT COURT OF APPEAL

Roger K. Vehrs, #073018
Attorney at Law
2300 Tulare Street
250 Civic Center Square
Fresno, California 93721
Telephone (209) 442-4211

Attorney for Appellant
DORIS HELLER

James. F. Tritt, #056171
TRITT & TRITT
1540 E. Shaw Avenue, Suite 115
Fresno, California 93710
Telephone (209) 224-7882

Associated Co-Counsel for
Appellant DORIS HELLER

* * *

ARGUMENT

I.

THE COURT OF APPEAL PROPERLY DETERMINED THAT INFORMAL COMMUNICATIONS WITH PHYSICIANS WHICH VIOLATE A PATIENT'S RIGHT OF PRIVACY (PHYSICIAN/PATIENT PRIVILEGE) MAY CREATE CAUSES OF ACTION FOR VIOLATION OF THE CONSTITUTIONAL RIGHT OF PRIVACY AND/OR CIVIL CODE SECTIONS 56.10 ET SEQ., WHICH ARE NOT BARRED BY CIVIL CODE SECTION 47(b)

The Court of Appeal's decision followed longstanding tradition in this country and this state of protecting the right of privacy of individuals. The court's analysis did not depart from, but rather implemented, well established legal precedent. The right of privacy protected in our state and federal Constitutions is one of the primary values in our society, and that right is particularly applicable to medical information:

> The significance of a patient's personal privacy rights with respect to medical matters is accorded special protection by the Legislature. (Evid. Code, section 990 et seq. [Physician-Patient Privilege], Civ. Code section 56 et seq. [Confidentiality of Medical Information Act].)

> In addition, the California voters in 1972 amended article I, section 1 of our state Constitution to include among the various "inalienable rights" that of "pursuing and obtaining . . . privacy." The "zones of privacy" created by this amendment "extend to the details of one's medical history" (Citation.), " ' . . . an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized . . . ' " (Citation.) (*Gross v. Recabaren* (1988) 206 Cal.App.3d 771, 782.)

That a violation of a patient's Constitutional right of privacy should prevail over a statutory immunity, such as Civil Code section 47(b), is not surprising but inevitable considering the superior legal status of a Constitutional provision:

> The right of free speech guaranteed by the state and federal Constitutions does not permit violation of the right of privacy. It most surely follows that the privilege created by Civil Code section 47(3) [another subdivision of the statute relied on by defendants herein], *a statute, and thus a law of lesser organic force,* cannot be expanded to permit violation of that same right of privacy. Whatever privilege is accorded defendants under Civil Code section 47(3), it must yield to the plaintiffs' Constitutional rights of privacy. (*Rancho La Costa, Inc. v. Superior Court* (1980) 106 Cal.App.3d 646, 667; emphasis added; cited in the Opinion, p. 22 in the instant case.)

That the causes of action for violation of Civil Code sections 56.10 et seq. are not barred by Civil Code section 47(b) is similarly inevitable. Civil Code sections 56.35 and

56.36 provide remedies for violations of Civil Code section 56.10 et seq. Therefore, by basing her claims upon that act and its remedies, the plaintiff has stated viable causes of action squarely within the holdings of *Kimmel v. Goland* (1990) 51 Cal.3d 202, 212, and *Ribas v. Clark* (1985) 38 Cal.3d 355, 364-365. In *Kimmel*, there was wiretapping which violated Penal Code section 632 and resulted in information used in connection with a judicial proceeding. Penal Code section 637.2 provided a statutory remedy for the violation of Penal Code section 632. The court held that the plaintiff stated a cause of action for the statutory remedy, to which the plaintiff became entitled immediately and before the use of the information in the judicial proceeding. Accordingly, Civil Code section 47(2) [now 47(b)] afforded no immunity. The same statutory violation and remedy led to the same result in *Ribas v. Clark*.

In the instant case, the statutory remedy was contained within Civil Code section 56 et seq., but the principle is identical to that implemented in *Kimmel* and *Ribas*. Because the statute provides for an immediate remedy, the plaintiff's right of recovery accrued *immediately* upon the violation of Civil Code section 56.10, and did not depend upon the subsequent use of the information involved in a judicial proceeding. Therefore, the bar of Civil Code section 47(b) does not reach the cause of action predicated on the statutory violation. Stated differently, the causes of action based on the remedies provided by the Confidentiality of Medical Information Act set forth claims independent of any injury plaintiff may have suffered by use of the information in the Geis litigation. (See Opinion, p. 18.)

In briefing at the appellate court level, the defendants who now complain of the Court of Appeal's holding based on the Confidentiality of Medical Information Act, did not even challenge the applicability of that act or the plaintiff's contention that her causes of action based thereon were not barred by Civil Code section 47(b). Defendants only argued that the Act did not apply because of "waiver" or because of Civil Code section 56.10(c)(4). (See Appellant's Reply Brief, p. 21; NORCAL Brief, pp. 25-29; YAMAGUCHI Brief, pp. 21-23.) The "waiver" argument, which reduces to an evaluation of the scope of the waiver, was appropriately disposed of by the Court of Appeal's focus on the *improper method* through which the defendants acquired information on the plaintiff. (See Opinion, pp. 23-25.) The defendants' reliance on Civil Code section 56.10(c)(4) was misplaced for the reason stated by the Court of Appeal at Opinion, p. 19. That subdivision is irrelevant because it only applies when the organizations or persons receiving the information "are engaged in reviewing the competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges." (See Opinion, p. 19.) Furthermore, the defendants have assumed, without justification, that any provider may furnish information concerning any other provider, when the statutory exception was designed for professional review of the same provider. (See Opinion, pp. 18-19; Appellant's Opening Brief, pp. 17-38.)

The fact that a select group of professionals may incur liability for violations of confidentiality in privileged relationships is not anomalous or unjust. Attorneys,

psychotherapists, tax preparers, and ministers, among others, have obligations to their clients to preserve client confidences. Our society has deemed it appropriate to provide privileges protecting communications between clients and such professionals. Certain professionals occupy sensitive positions due to their receipt of private and personal information of clients. When deemed appropriate by the Legislature, or the courts, or the Constitution, such communications are granted privileged status and are protected by the Constitutional right of privacy. The Court of Appeal's Opinion in the instant case is not only legally correct, but promotes the value of privacy within selected confidential relationships.

* * *

RULE 27. REHEARING IN COURT RENDERING DECISION

(a) [Power to grant rehearing] The Supreme Court or a Court of Appeal may grant a rehearing after its own decision in any cause except the denial by a Court of Appeal of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal in a case within the original jurisdiction of a municipal or justice court. A rehearing may be granted on petition, as provided in subdivision (b), or on the court's own motion before the decision becomes final.

(b) [Time for filing petition] A party seeking a rehearing either in the Court of Appeal or in the Supreme Court must serve and file a petition therefor within 15 days after the filing of the decision.

(c) [Time for filing answer] An answer may be served and filed within 23 days after the filing of the decision.

(d) [Form of petition and answer] Insofar as practicable, the petition and answer shall conform to the provisions of rule 15.

(e) [Determination of petition] An order of the Supreme Court granting a rehearing shall be signed by at least four judges assenting thereto, and filed with the clerk. If no order is made before the decision becomes final as provided in subdivision (a) of rule 24, the petition shall be deemed denied, and the clerk shall enter a notation in the register to that effect.

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
STATE OF CALIFORNIA
2525 Capitol Street
P.O. Box 45013
Fresno, California 93718

(209) 445-5491

April 21, 1993

Tritt & Tritt
Mr. James F. Tritt
1540 E. Shaw Avenue, No. 115
Fresno, CA 93710

Mr. Roger K. Vehrs
2300 Tulare Street, Suite 250
Fresno, CA 93721

Diehl, Steinheimer, Riggio, Haydel & Mordaunt
Mr. Joseph H. Fagundes
P. O. Box 201072
Stockton, CA 95201

Anderson, Galloway & Lucchese
Ms. Karen A. Sparks
1676 North California Blvd., Suite 500
Walnut Creek, CA 94596-4642

Diepenbrock, Wulff, Plant & Hannigan
Mr. John R. Haluck
P. O. Box 3034
Sacramento, CA 95812-3034

Re: Nos. F015875 and F016047
Doris Heller v. Norcal Mutual Insurance Company et al.;
Doris Heller v. Superior Court; Norcal Mutual et al.
Oral Argument Scheduled For May 1993

Dear Counsel:

Although you may have earlier requested oral argument, the court, after consideration, is willing to accept submission of this case without oral argument. However, if either side desires oral argument, the case will remain on the calendar for such argument. If the court does not receive such a request from either side within 10 days from the date of this letter, the case will be removed from the calendar, oral argument will be deemed waived and the cause will be submitted on the record and briefs now on file.

Please send a copy of any request for oral argument to all other counsel.

Arguments contained in your briefs need not be orally presented unless you have something new to add. Supplementary authorities may be submitted by letter within 10 days from the date of this letter, whether or not oral argument is waived. Please do not simply list authorities. Indicate to which issue the cited authority pertains and briefly state what the authority holds.

Very truly yours,

/s/ Kevin A. Swanson
KEVIN A. SWANSON, Clerk